

32

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLACK HILLS DIPPER
Black Hills Region of South Dakota and Wyoming,

BIODIVERSITY CONSERVATION ALLIANCE
PO Box 1512
Laramie, WY 82073,

CENTER FOR NATIVE ECOSYSTEMS
1536 Wynkoop, Suite 301
Denver, CO 80202,

Civ. No.

and

JEREMY NICHOLS
PO Box 2137
Laramie, WY 82073

Plaintiffs,

vs.

GALE NORTON
Secretary of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

and

STEVEN WILLIAMS
Director of the U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, D.C. 20240

Defendants.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Post-It* Fax Note	7671	Date	# of pages
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INTRODUCTION

1. Plaintiffs BLACK HILLS AMERICAN DIPPER, BIODIVERSITY CONSERVATION ALLIANCE, CENTER FOR NATIVE ECOSYSTEMS, and JEREMY NICHOLS challenge the failure of the Secretary of the Interior, GALE NORTON, and Director of the United States Fish and Wildlife Service (FWS), STEVEN WILLIAMS, to perform a mandatory duty required by section 4(b)(3)(A) of the Endangered Species Act (ESA) concerning the petition to list the Black Hills distinct vertebrate population segment of American Dipper (*Cinclus mexicanus unicolor*) as an endangered or threatened species. Defendants have violated their mandatory duty under the ESA to make a 90-day finding as to whether the petition to list the Black Hills distinct vertebrate population segment of American Dipper (the "Black Hills Dipper" or the "dipper") under the ESA presents substantial scientific or commercial information indicating that the petitioned action may be warranted. See 16 U.S.C. § 1533(b)(3)(A). It has been well over one year since Defendants have received the Black Hills Dipper listing petition.

JURISDICTION AND VENUE

2. This is an ESA citizen suit in which Plaintiffs allege that Defendants, who are federal officers, violated a mandatory duty under Section 4 of the ESA. Thus, this Court has jurisdiction over this matter pursuant to 16 U.S.C. § 1540(g) (citizen suits under the ESA) and 28 U.S.C. § 1331.
3. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201 (declaratory judgments).
4. A substantial part of the events and omissions giving rise to the claims in this case as well as the violation of the mandatory duty occurred in the District of Columbia. Furthermore,

Defendants Gale Norton and Steven Williams reside in the District of Columbia. Thus, venue is proper in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e)(1) and (2).

5. By letter dated July 15, 2003, Plaintiffs provided Defendants with written notice of their intent to sue for this violation of section 4 of the ESA. See 16 U.S.C. § 1540(g)(2)(C). More than sixty days has past since Defendants received Plaintiffs written notice of intent to sue.

PARTIES

6. Plaintiff BLACK HILLS DIPPER is a gray and brown aquatic songbird roughly fifteen to twenty centimeters in length, whose name derives from its characteristic bobbing movements. Due to the Black Hills Dipper's geographic isolation and persistence in a unique geological setting, the Black Hills Dipper is genetically, behaviorally, and morphologically distinct from other populations of American Dipper. The Black Hills Dipper and its habitat have been, and are being, severely adversely affected by many human activities. The human activities that threaten the continued existence of the Black Hills Dipper include logging, livestock grazing, mining, land development, road construction, and water diversions.

7. Plaintiff BIODIVERSITY CONSERVATION ALLIANCE is a Laramie, Wyoming-based nonprofit conservation organization dedicated to protecting and restoring native species of plants and animals in the Rocky Mountain Region, including the Black Hills of South Dakota and Wyoming. Biodiversity Conservation Alliance staff and members work to protect the habitat of the Black Hills Dipper and conduct extensive research on the dipper and its habitat. Staff and members of Biodiversity Conservation Alliance frequently recreate in the habitat area of the dipper, observe and attempt to observe the dipper and plan to continue to do so in the future. Staff and members seek to ensure that the Black Hills Dipper can exist in their natural habitat.

Thus, staff and members work to compel those agencies charged with protecting endangered and threatened species to follow the laws designed to protect those species which included drafting the petition to list the Black Hills Dipper under the ESA.

8. The above-described scientific, educational, aesthetic, recreational, spiritual, and conservation interests of Biodiversity Conservation Alliance, its staff and supporters, have been, are being, and unless this Court grants the requested relief, will continue to be adversely affected and irreparably injured by Defendants' inaction.

9. Plaintiff CENTER FOR NATIVE ECOSYSTEMS is a Denver, Colorado-based non-profit, science-based conservation organization dedicated to protecting and recovering native and naturally functioning ecosystems in the Greater Southern Rockies and Great Plains which includes the Black Hills. The Center, its staff, and members derive scientific, aesthetic, and spiritual benefit from the Black Hills Dipper's existence in the wild and from the ecosystem upon which the dipper depends. Center for Native Ecosystems assisted with the drafting of the petition to list the Black Hills Dipper. Center for Native Ecosystems staff and members regularly recreate in the habitat area of the dipper and plan to continue to do so in the future.

10. The above-described educational, scientific, aesthetic, spiritual, and conservation interests of the Center, its staff and members, have been, are being, and unless this Court grants the requested relief, will continue to be adversely affected and irreparably injured by Defendants' inaction.

11. Plaintiff JEREMY NICHOLS is a Laramie, Wyoming resident who has worked to protect and restore the natural values of the Black Hills of South Dakota and Wyoming for over three years. Mr. Nichols prepared the petition to list the Black Hills Dipper and continues to monitor the status of the dipper and its habitat. Mr. Nichols and his family use and enjoy the Black Hills

primarily for viewing wildlife, including the Black Hills Dipper, hiking, and camping and have expressed numerous concerns over the imperiled species of the Black Hills. Mr. Nichols has an educational, scientific, aesthetic, and conservation interest in the survival and recovery of the Black Hills Dipper. These interests of Mr. Nichols have been, are being, and unless this Court grants the requested relief, will continue to be adversely affected and irreparably injured by Defendants' inaction.

12. Defendant GALE NORTON is sued in his official capacity as the Secretary of the Interior (Secretary). The Secretary is the federal official who bears ultimate responsibility for implementation of the ESA, including making 90 day determinations on petitions to list species.

13. Defendant STEVEN WILLIAMS is sued in his official capacity as the Director of the United States Fish and Wildlife Service, which is a part of the Department of Interior. Mr. Williams is charged with administering the ESA including review and approval of proposed listing decisions for endangered and threatened species.

STATUTORY FRAMEWORK

14. The Endangered Species Act, 16 U.S.C. §§ 1531-1544 (ESA) seeks "to provide a program for the conservation of . . . endangered species and threatened species." 16 U.S.C. § 1531(b). An essential component of this program is known as the listing process, as the protections contained in the ESA apply only to those species that are listed as endangered or threatened. To achieve its objectives and goals, the ESA provides that interested persons can begin the listing process by filing a petition with the FWS to list a species or a distinction population segment (DPS) of a species as endangered or threatened. 16 U.S.C. § 1533(b)(3)(A)(ESA § 4(b)(3)(A)).

15. Upon receipt of a petition to list a species, the FWS must review the petition and within ninety (90) days, "to the maximum extent practicable," make a finding as to whether that petition presents substantial information indicating that the petitioned listing may be warranted. 16 U.S.C. § 1533(b)(3)(A).

16. In the event that the initial "90-day finding" is affirmative, that is that the petition does present "substantial information" that a listing rule may be warranted, the FWS shall issue a second finding, commonly referred to as the "12-month finding," within twelve (12) months of the date of receipt of a petition. 16 U.S.C. § 1533(b)(3)(B). In the 12-month finding the FWS must reach one of three possible conclusions: that (1) the petitioned action is warranted; (2) the petitioned action is warranted but presently precluded by other pending proposals for listing species; or (3) the petitioned action is not warranted. Id.

17. Although the ESA recognizes that it will not always be possible for FWS to complete a 90-day finding within ninety days, ESA § 4(b)(3)(A), the statute clearly sets a maximum limit on the amount of time that FWS can take to make a 90-day finding. The deadline for the 12-month finding is twelve months from the date that the listing petition was received, without exception. See ESA § 4(b)(3)(B). Thus, FWS must complete the 90-day finding for a listing petition within one year of receiving that petition, as the 90-day finding is a prerequisite step in the 12-month finding process. See American Lands Alliance v. Norton, 242 F.Supp.2d 1, 8, fn. 7 (D.D.C. 2003) citing Biological Diversity Foundation v. Babbitt, 63 F.Supp.2d 31 (D.D.C. 1999). See also Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166, 1178 (9th Cir. 2002),

BLACK HILLS DIPPER

18. The American Dipper is a highly specialized bird species that inhabits swift-running cold mountain streams in the western half of North America. Because of their habitat needs, American Dippers are a useful indicator of water quality. The diet of the American Dipper consists primarily of pollution-intolerant aquatic insects, and thus healthy American Dipper populations indicate excellent overall stream health. Conversely, rapid declines in American Dipper populations can provide notice of an approaching environmental problem, aiding in the prevention of human illness and the avoidance of further environmental damage.

19. The Black Hills mountain range covers roughly two million acres, running from northwest Wyoming into western South Dakota, and is entirely surrounded by more than 150 miles of grassland. As an isolated mountain ecosystem, the Black Hills are especially vulnerable to environmental degradation. Pressured by more than a century of logging, livestock grazing, mining, road construction, water diversions, and land development, the Black Hills ecosystem is on the verge of collapse. However, little has been done to stem the tide of ecological damage and many species, unable to migrate across the grassland to a more suitable mountain habitat, face the possibility of extinction.

20. Of the two million acres that comprise the Black Hills, the largest portion, roughly 1.2 million acres, is subsumed within the Black Hills National Forest, and thus under the control of the federal government. The bulk of the remaining Black Hills lands are owned by private landholders and state governments.

21. American Dippers are believed to have migrated to the Black Hills during the last Ice Age, between 13,000 and 30,000 years ago. At that time, forested streams running between the Rocky

Mountains and the Black Hills enabled American Dipper populations to extend eastward into the Black Hills. When this Ice Age ended the forest between the Rocky Mountains and Black Hills evolved into grassland, leaving the American Dipper populations in the Black Hills isolated.

Current research strongly indicates that American Dippers do not migrate long distances.

Further, the significant ecological barrier that now exists between the Black Hills and Rocky Mountains means that Black Hills Dipper populations cannot successfully migrate in search of a new habitat.

22. Historically, the Black Hills Dipper was known to inhabit nearly all fast-flowing streams in the Black Hills. However, in the last decade, both the population and distribution of the Black Hills Dipper have shrunk significantly. The dipper has now disappeared from nearly 86% of its former territory. Although verified historical reports document that the dipper once inhabited a half-dozen streams in the Black Hills, currently only a single stream, Spearfish Creek, is supporting a viable Black Hills Dipper population. The fact that the few remaining Black Hills Dippers have been forced into a habitat which encompasses only a small fraction of their former range makes it much more likely that the dipper will be unable to survive a catastrophic event, such as a wildfire or flood. Additionally, the inbreeding that may occur among such a small and confined group of birds could reduce the dipper population's fitness for survival.

23. Elevated levels of sediment in streams are the greatest threat to the continued existence of the Black Hills Dipper. High silt concentrations smother the aquatic insects on which the dipper feeds. Sedimentation in streams on the Black Hills has increased due to excessive livestock use of streams and riparian areas, logging, mining, and road construction, use, and reconstruction. However, sedimentation is not the only human-caused environmental problem threatening the dipper.

24. Livestock grazing threatens the Black Hills Dipper because of stream channel alteration, reduction in streamside vegetation, increased water temperature, and sedimentation. As livestock tread on the stream banks, they release sediment into the stream causing the stream to run wider and shallower. Grazing of streamside vegetation also eliminates shading, raising stream temperature as more sunlight reaches the water. Livestock grazing is permitted on approximately 83% of the Black Hills National Forest land.

25. Logging reduces the available habitat of the Black Hills Dipper and results in sedimentation of streams by leaving large areas of soil unprotected against erosion. There are many logging projects currently underway in the Black Hills, and additional proposed timber sales also threaten the continued existence of the dipper. These logging projects have directly contributed to sediment problems on streams that are or could be supporting populations of Black Hills Dipper.

26. Past and current mining activities impair the ability of the Black Hills Dipper to survive in its native habitat. Acid drainage is considered the most serious mining related problem confronting the dipper. Drainage running from abandoned gold mines causes pH levels in streams to reach levels that are harmful to the dipper. Mining runoff also carries excessive concentrations of heavy metals, which can also adversely affect the dipper. The disturbance of aquatic habitat and sedimentation that results from placer mining also carries negative consequences for the remaining populations of Black Hills Dipper.

27. Roads adversely affect Black Hills Dippers by contributing to sedimentation of streams and altering stream morphology. Roads can cause significant stream sedimentation problems because of the large amount of area that they cover and because they often run next to and across streams. The high density of roads in the Black Hills National Forest already causes problems for the remaining populations of Black Hills Dipper, and additional road construction and

reconstruction projects awaiting authorization will exacerbate the degradation of the dipper's habitat.

28. Inadequate water quantity in the Black Hills Dipper's habitat also adversely impacts the dipper's chances for long-term survival. Dams, diversions, and other water control structures create streamflows that are too low and erratic to sustain dipper populations. Inadequate streamflow leaves streams more susceptible to changes in temperature, increases the effects of sedimentation, and can cause some streams to flow only intermittently. Meanwhile, excessive water releases from dams can destroy dipper nesting sites. The increasing suburbanization of the Black Hills is also leading to greater water consumption, leaving less water to sustain the dipper's habitat.

29. Federal and state regulations are inadequate to prevent the threats associated with livestock grazing, water diversions, logging, road building, mining, and land development.

PETITION TO LIST THE BLACK HILLS DIPPER

30. Plaintiffs BIODIVERSITY CONSERVATION ALLIANCE, CENTER FOR NATIVE ECOSYSTEMS, and JEREMY NICHOLS, among others submitted a petition to list the Black Hills Dipper as endangered or threatened on March 15, 2003. Defendants received this petition to list the dipper on March 28, 2003, more than one full year ago.

FIRST CLAIM FOR RELIEF (ESA Section 4(b)(3)(A))

31. Each allegation set forth in the Complaint is incorporated herein by reference.

32. To date, Defendants have failed to make an initial 90-day finding even though it has been more than a year since Defendants have received the petition to list the Black Hills Dipper.

33. Therefore, Defendants are in violation of their mandatory duty under section 4(b)(3)(A) of the ESA by failing to make an initial 90-day finding. 16 U.S.C. § 1533(b)(3)(A);

(ALTERNATIVE) SECOND CLAIM FOR RELIEF
(APA UNREASONABLE DELAY;

34. Each allegation set forth in the Complaint is incorporated herein by reference.

35. Section 4 of the ESA establishes a time frame within which Congress intended agencies to respond to petitions to list species.

36. Numerous factors continue to threaten the few remaining Black Hills Dippers, which seriously harms human welfare interests in the conservation of native species.

37. Defendants have unreasonably delayed agency action by failing to make an initial 90-day finding. 5 U.S.C. § 706(1).

PLAINTIFFS' PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment providing the following relief:

1. Declare that Defendants violated the ESA by failing to make a mandatory initial 90-day finding;
2. Declare that Defendants unreasonably delayed agency action by failing to make a mandatory initial 90-day finding;
3. Order Defendants through an injunction to make an initial 90-day finding by a date certain;
4. Award Plaintiffs' costs, including reasonable attorneys' fees and expert witness fees; and

5. Provide such other and further relief as the Court deems just and proper

Respectfully submitted,

Robert Ukeiley (MD14062)

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United States District Court
For the District of ColumbiaNANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

Black Hills Dipper, et al.

vs.

Plaintiff

Gail Norton, et al.

Defendant

CASE NUMBER 1:04CV01293

JUDGE: Richard J. Leon

DECK TYPE: Administrative Agency Review

DATE STAMP: 08/02/2004

CERTIFICATE RULE 1.1(c)(2)

I, the undersigned, counsel of record for Center for Native Ecosystems certify that to the best of my knowledge and belief, the following are parent companies, subsidiaries or affiliates of Center for Native Ecosystems which have any outstanding securities in the hands of the public.

None

These representations are made in order that judges of this court may determine the need for recusal.

Attorney of Record

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